FLAMMABLE FABRICS, DETERGENTS, FARM MACHINERY AND EQUIPMENT

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Every products liability claim must be investigated most carefully by defendant's counsel. The personnel of the corporation, partnership or individual who manufactures and sells articles for consumption and use by the public have to be carefully questioned concerning the identity of the product involved in the particular claim. After the product has been identified, a minute inspection of the product has to be made as soon as possible. In this connection, defense counsel should obtain the services of an expert to aid in the examination and inspection of the product involved. Careful note must be made of the circumstances under which the product is examined, and the location of the product when the injury occurred if the product has been moved from the place where the injury occurred. Colored photographs of the product should be obtained, which localize the particular items of the product which are the subject of the claim.

While the defense is generally behind the plaintiff insofar as investigation into the causes of the failure of the product is concerned, defense counsel must overcome the time lag in investigation and must, through careful questioning, checking, and tracing, produce a better and more factual investigation than does counsel representing the claimant. Careful inquiry must be made concerning quality control, testing, improvements, parts defects, attitude of employees, safety factors, shipping accidents, and the like, insofar as the particular product is concerned. Counsel must consider the advisability of having visual tests performed, as well as deciding whether films of various tests made of the product or the manufacturing of the product can be used as demonstrative evidence. Inquiry must be made to obtain records of tests of the product made before marketing, and to ascertain the number of claims received concerning defects in the product after marketing. Looking toward defenses pertaining to warranties and representations, if any, made by the manufacturer, consideration must be given to having a scientific analysis made of the product, as well as learning the methods used by the manufacturer to sell the product.

Attention must be given to the background of the claimant with the thought in mind of proving an assumption of risk defense or that the plaintiff was contributorily negligent in the use of the product. In the fabric and detergent cases, consideration must be given to the

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prior physical condition of the plaintiff, and inquiry must be made into the plaintiff's background to ascertain if the plaintiff is allergic to various chemicals or fabrics. Also, any physical defects of the plaintiff should be ascertained, with particular inquiry made into the plaintiff's eyesight, hearing, and ability to use the arms and legs normally. The plaintiff's work record and "accident proneness" record must be looked into. The plaintiff, through a deposition or witnesses, if a deposition is not possible, must be checked concerning the facts involved in the use of the product prior to, at the time, and after the accident occurred. Information must be obtained as to how long the product has been used, and how long the allegedly injured plaintiff worked with the product or used it.

With the rapid advance in the number of cases being filed on behalf of allegedly injured persons who claim to have been injured as a result of failures in products, fabrics, or detergents resulting from material defects or breaches of implied or express warranties, consideration must be given to the vulnerability of manufacturers to the "vouching in" principle. Where it can be proved that the manufacturer is primarily liable, the principles of indemnity will apply, and the "middle man" or retailer may "vouch in" the manufacturer when a personal injury is claimed to have resulted from a breach of warranty or material defect in the product, provided the "middle man" or retailer has not changed the product nor advanced a different warranty than that used by the manufacturer. In most cases, the "vouching in" principle is applied where the product is sold subject to an implied warranty of fitness and merchantability. In such cases, when the retailer or "middle man" is sued by the allegedly injured user of the product, the retailer or "middle man" can give notice of the claim or lawsuit to the manufacturer and tender the defense of the lawsuit to the manufacturer by placing the manufacturer on notice concerning the claims made by the injured user. If the manufacturer refuses to take over the defense of the lawsuit and the retailer or "middle man" is held liable, then, in a subsequent action, the retailer or "middle man" may sue the manufacturer. The manufacturer's liability is concluded by the judgment previously obtained against the retailer or "middle man" because of the "vouching in" principle. It holds that since the manufacturer was duly notified of the lawsuit and was afforded the opportunity to defend same, the manufacturer is liable for the amount of the judgment obtained, together with expenses and attorney fees.

In the case of *Frank R. Jelleff, Inc. v. Pollak Bros., Inc.*,[1] the retailer (Jelleff) sold a housecoat to defendant who was badly burned

[1] 171 F. Supp. 467 (N.D. Ind. 1957).

when the inflammable material of the housecoat caught fire. The injured purchaser sued the retailer because of a breach of an implied warranty of fitness and merchantability. The retailer notified the manufacturer of the lawsuit, and asked the manufacturer to defend the case. The retailer told the manufacturer that if the injured purchaser obtained a judgment against the retailer, the retailer would immediately seek to be indemnified and would sue the manufacturer. The manufacturer of the housecoat refused to take over the defense of the case filed against the retailer. The retailer was held liable to the injured purchaser. The retailer then sued the manufacturer, and the court rendered a summary judgment for the retailer against the manufacturer. The court held that the manufacturer sold the housecoat to the retailer subject to an implied warranty of fitness and merchantability; that the retailer had given notice and tendered the defense of the law suit to the manufacturer; that the retailer had been found liable and had paid the amount of the judgment to the injured purchaser; and that because of these facts the manufacturer was liable for the amount of money paid out by the retailer to the injured purchaser, together with the retailer's expenses incurred in defending the lawsuit and attorney fees.

In a recent case decided by the Sixth Circuit Court of Appeals, *Katherine Hessler v. The Hillwood Mfg. Co.*,[2] the court held as follows:

> 1. Nail manufacturer which was "vouched in," in nail buyer's case against retailer for injuries from defective nail, and which refused to defend was concluded by judgment rendered against retailer in that case.
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> 2. Where retailer paid judgment obtained against it by buyer for injuries from defective nail and brought suit against manufacturer and offered independent evidence as to all essential elements of case, retailer was entitled to recover from manufacturer even if buyer's judgment against retailer were not conclusive. . . .
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> 4. Nail manufacturer, sued by retailer which paid judgment in buyer's action against retailer for injuries sustained from defective nail, could not question whether defense of buyer's case against retailer, which manufacturer refused to assume, had been skillfully handled.

In the trial of a products liability case, it is the duty and obligation of trial counsel to learn everything that can be learned about the product involved. Counsel must be educated personally, and should not attempt to have someone else make a technical investigation of the

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[2] 302 F.2d 61 (6th Cir. 1962). *Accord*, St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. Co., 162 N.W. 812, 816 (Iowa Sup. Ct. 1917); Restatement, Judgments § 107 (1942); 1 Freeman, Judgments §§ 447, 448 (5th ed. 1925).

product and attempt to glean that information from the investigator and then try to present evidence to a jury about which he has no personal knowledge. Trial counsel should actually see the product, feel it, and use it, or take it apart, if possible, depending upon the circumstances of the particular case.

If a manufacturer is being represented, distributors and retailers of the product should be contacted to learn what they have said to the users of the product in selling or recommending it. Information should be obtained as to what the seller or distributor of the product said about the product after the accident occurred.

All of the discovery tools available to trial counsel, including the use of interrogatories and the taking of depositions, should be considered, so that at the time of trial counsel is certain he has all the information it is possible to obtain concerning the product involved, its use, and the claimed failure of the product.

The defense of contributory negligence should only be raised if a strong case of such negligence can be made out. Assumption of risk is probably the best psychological defense that can be raised in these cases insofar as communication with the jury is concerned. The defense of assumption of risk should only be argued if the investigation is well documented and reliable so that evidence of the assumption of risk can be comprehended easily by the jury, as well as difficult to deny by the plaintiff.

The standard of care demanded of manufacturers of farm implements is that of reasonable care in designing, selecting materials, assembling, or doing anything that goes to the formulation of the product. The same duty applies to manufacturers of fabrics and detergents. It is such reasonable care that will fairly meet any emergency of use which can reasonably be anticipated.[3]

A manufacturer or seller of a product has no duty to deal in a "perfect" product, nor in a product which when used guarantees that injury is totally impossible. Further, a merchant is not required to sell only the latest or safest models of a product. Various models of similar implements manufactured by different corporations may be dissimilar in size or design, or in the number of safety devices provided. We are all aware of the fact that new models of products are being placed on the market almost daily. Varied prices for the same model of the product are asked, depending on the state of the economy, and many other factors. Therefore, since the purchaser, in most cases, exercises his personal choice or whim in making the purchase, there

[3] Davlin v. Henry Ford and Son, 20 F.2d 317 (6th Cir. 1927).

is no law requiring a merchant to offer only the latest models or only those equipped with approved safeguards for sale.[4]

A manufacturer or seller is not an insurer of the products he sells. He is not liable for injuries resulting from the use of a product due to an unavoidable accident, or resulting from ordinary wear and tear. A manufacturer of farm machinery cannot be held liable merely because injuries are sustained by users of such implements. Common knowledge tells us that injuries are frequently experienced by the users of mowers, binders, threshers, tractors, corn shellers, hay loaders, and other similar pieces of farm machinery.[5]

However, the particular machinery or product may be of such nature that, in the exercise of ordinary care, the manufacturer has a duty to the users thereof to equip such machinery or product with various safety devices. A manufacturer may be liable for failure to provide a shield or an emphatic warning as to the dangers involved to users of an electric power saw.[6] In such cases, however, the manufacturer is not required to equip the machinery with guards or other safety features if it can be proved injury would only occur from a known danger of which the user is well aware.

> Although a lead pencil can stab a man through his heart or puncture his jugular vein, a manufacturer of such a pencil has no obligation to equip it with a safety guard.[7]

There is no obligation on the part of a manufacturer to equip his product with safety devices if, by a preponderance of the evidence, it can be proved injuries sustained from the use of the machine were not "probably" caused thereby, as opposed to the injuries "possibly" being caused by the use of the machine.

Retailers are usually not required to inspect the products they sell for the purpose of discovering any latent defects in the products. Sellers of nationally known products being merchandised under trade names do not have to inspect such products for defects which are minimal or mechanical in nature. When it is proved a retailer neither knows or has reason to know that the product he sells is, or is likely to be dangerous, he cannot be held liable for injuries or damages caused by its dangerous character. This is true even though the retailer could have discovered the dangers had a reasonable inspection been made of the product before it was sold. Further, the retailer

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4 Kientz v. Carlton, 245 N.C. 236, 96 S.E.2d 14 (1957).

5 Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940); Heichel v. Lima-Hamilton Corp., 98 F. Supp. 232 (N.D. Ohio 1951).

6 Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 855 (1957).

7 *Ibid.*

cannot be held liable for a failure to properly inspect where it appears the injury resulted from a defect in the product which inspection would not have revealed. In addition, a retailer is only required to make a reasonable inspection of products he sells in sealed packages as received from the manufacturer. When the sealed package appears to be in good condition and cannot be inspected further without opening or breaking the container, the retailer is not required to open or break the package to further inspect the product in the exercise of ordinary care.

A manufacturer must use reasonable care and inspect the parts manufactured by others which are used in his finished product. He cannot rely upon the inspections or representations of the manufacturers of the parts to avoid liability to a user of the product if the finished product fails after sale.[8] It is not enough for the selling manufacturer to make reasonable tests; he must prove that the tests were carried out in a careful manner, and as ordinarily expected and accomplished by the employees making the inspections. Conversely, unless a manufacturer can reasonably be said to be aware of the fact that his product would be harmful if used for a purpose other than that for which it is intended, the manufacturer is not required to inspect his product for ingredients or parts which would cause injury under such circumstances.

The manufacturer's or seller's duty to warn users of a product is not a mandatory duty which is required of all manufacturers or sellers regardless of the nature of the product. A manufacturer or seller must warn users of the product only when he has actual or constructive knowledge that its use involves dangers. In this case, he has a duty to give reasonable and adequate warnings of the dangers involved.

Dempsey v. Virginia Dare Stores[9] was a suit against a retailer for injuries sustained when a "Fuzzy Wuzzy" robe being worn by plaintiff burst into flame. The robe was rayon and very fuzzy on the outside. Plaintiff was smoking at the time. Appealing from an order refusing to set aside an involuntary nonsuit, plaintiff argued that defendant was liable because defendant knew, or by the exercise of ordinary care should have known, that the robe was made of material which was highly inflammable and was inherently dangerous to wear, and failed to warn plaintiff of its dangerous qualities. The court said plaintiff could not claim that she did not know what any ordinarily intelligent person would know by observing the material, namely, that fluffy and "fuzzy wuzzy" materials will ignite and burn more rapidly than ordi-

8 International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953).

9 239 Mo. App. 355, 186 S.W.2d 217 (1945).

nary cloth. There is no duty on the part of the seller of such a material to notify the buyer of its inflammable qualities under the facts of the case. The court pointed out that even if the robe had qualities of inflammability and was of such character that the defendant should have advised plaintiff thereof, there was no evidence in the case that the defendant knew, or should have known, of such condition.

A seller of a dangerous product is charged with the duty of giving the purchaser of the dangerous product a reasonable warning. The warning must be understandable, strongly worded, and easily seen by the user. The seller of the dangerous product bears the burden of any ambiguity in the use of the warning language. In addition, the warning must be appropriate to the product. The more dangerous the product is, the more certain the manufacturer must be that a warning commensurate with the danger has been given to the users of the product. The seller and manufacturer must be aware of the chances of injury occurring, and must give a warning to the users which would cause an ordinary user of the product to reasonably appreciate the dangers in connection with the use of the product—and, in some cases, the dangers involved in the misuse of the product.

Since a seller or manufacturer must give these instructions and warnings by printed labels readily observable by the users, the seller and manufacturer is responsible for the adequacy and truthfulness of the instructions and warnings given, and is guilty of negligence when the labels fail to properly and adequately inform the users of the product of its dangers and proper use. The newspaper advertisements used by the manufacturer or seller are now coming under close scrutiny by counsel for both plaintiff and defendant. The representations set forth in such advertisements must properly, reasonably, and adequately advise the public of the uses and dangers involved, if any, and the uses to which the product may be safely put. In the case of *Oettinger v. Norton Co.*[10] plaintiff sustained injuries when a spindle of a mounted abrasive point, manufactured by defendant, broke while being operated by plaintiff at high speed. The accident occurred because the point was being operated at a speed in excess of its maximum safe speed. Plaintiff claimed defendant failed to do all that it reasonably might have done to give notice of the limitations of abrasive points. Plaintiff said information as to the maximum speed at which the points could be safely used should have been plainly marked either upon the product or upon the container in which it was packed. Defendant said it was impractical to warn users of the points as suggested, and displayed pamphlets it distributed to users of the points containing information

[10] 160 F. Supp. 399 (E.D. Pa. 1957), *aff'd on op. below*, 253 F.2d 712 (3d Cir. 1957).

concerning the proper use of the product. It was clear defendant had given plaintiff's employer all the information on the maximum safe speed of mounted points necessary to insure their safe use, and the court said that under Pennsylvania law defendant was not required to do any more than it had done. The court found, in view of the evidence, that plaintiff was guilty of contributory negligence since plaintiff was fully aware of the danger in operating abrasive points at excessive speeds. Plaintiff also knew there were notices and pamphlets available to him in the shop where he did his work which showed the safe operating speeds of wheels of various dimensions.

In *Panther Oil & Grease Mfg. Co. v. Segerstrom*,[11] a property loss was sustained as a result of a fire which occurred when plaintiff's unskilled crew undertook to heat a product called "Battleship Roof Primer," manufactured by defendant and sold through defendant's agent. Heating was decided upon to make the primer soft so it could be used on a roof. No warning of any kind was used on the containers of the primer. An instruction pamphlet, relating expressly to "Battleship Liquid Asbestos Roof Coating" and not referring to the primer itself, was given plaintiff at the time of purchase. The instructions contained a statement that "Battleship" should not be heated with an open flame since when this is done "the waterproofing qualities of Battleship are damaged . . . (and) a proper job is impossible." The court rejected defendant's contention that plaintiff was guilty of negligence in failing to heed the language of the instruction pamphlet, or to show the pamphlet to his employees. The court held the pamphlet actually said no more than that heating of the product would damage its waterproofing qualities, and did not warn or suggest that heating would or might produce a hazard of any sort other than heating would make "a proper job impossible."

An action was brought on the theory of nuisance for the death of a minor child when a "Gene Autry" cowboy suit worn by the child caught fire. Plaintiff claimed that defendants manufactured and sold the suit with inflammable chaps of pile rayon without warning the purchasers or wearers of the suits of the danger from contact with fire. The court said there could be no recovery against defendants on the ground of nuisance. The evidence was that defendants had failed to properly treat the material, or to warn the purchaser or wearer of the child's suit of its inflammable nature. The court held this was negligence, and not nuisance.[12]

Injury caused by farm machinery has given rise to a number of

[11] 224 F.2d 216 (9th Cir. 1955).

[12] Blessington v. McCrory Stores Corp., 198 Misc. 291, 95 N.Y.S.2d 414 (Sup. Ct. 1950), *aff'd*, 305 N.Y. 140, 111 N.E.2d 421, 37 A.L.R.2d 698 (1953).

actions in which it was sought to hold the manufacturer or seller of the machinery in question liable for the injury. Balers are among the types of farm machinery which have been involved in such actions.

Allis-Chalmers Mfg. Co. v. Wichman[13] was an action brought for injuries resulting from plaintiff's hand and leg being drawn into the compressing rollers of a hay baling machine. Plaintiff testified that defendant's demonstrator-representative told him that whenever the baling twine of the machine failed to engage with the rotating rollers, he should stand on the frame of the machine and push the twine into contact with the rollers by means of hay held in his hand. When plaintiff was injured, the hay he was using to push the twine into contact pulled his hand into the rollers and his body was jerked up on the conveyor so his leg was also pulled into the rollers. The court held the trial court properly decided that the question whether defendant's demonstrator-representative was guilty of a lack of due care in giving directions and assurances to the plaintiff was one of fact, and not of law. The court also said that whether plaintiff was contributorily negligent in following the instructions allegedly given him by defendant's demonstrator-representative presented an issue of fact, and not of law.

In the case of *De Eugeno v. Allis-Chalmers Mfg. Co.*[14] plaintiff's right arm was crushed between the rollers of a hay baler. Difficulties in the operation of the baler were discovered upon delivery of the baler. Defendant's employees tried to rectify the difficulties, and in trying to make it operate properly, one employee would walk at the left front tossing accumulated hay onto the chute. The hay would accumulate in front of the chute, and this prevented a smooth flow of hay into the chute and into the rollers. This caused the baler to lunge forward or from side to side in an erratic manner. After observing defendant's employee, plaintiff began walking along the left side of the baler as defendant's representatives had done and was knocked off balance by the baler, due to its erratic action. Plaintiff fell and was carried up the chute, resulting in his arm being crushed. There was sufficient evidence to support a jury finding of negligence on the part of defendant's representatives.

Defendant's representatives had a definite duty to use due care in instructing plaintiff as to the operation of the machine. It was for the jury to say if plaintiff had been exposed to an unreasonable degree of harm when he was told that the proper way to operate the machine was to walk along near the left front of the chute in order to place hay on the conveyor. There is no duty to warn against the obvious. Defendant had no duty to warn plaintiff to stay away from the front

[13] 220 F.2d 426 (8th Cir. 1955), *cert. denied*, 350 U.S. 835 (1955).

[14] 210 F.2d 409 (3d Cir. 1954).

of the chute, but even though there may have been no duty to warn plaintiff to stay clear of the chute, there was a duty on the part of defendant's representative not to direct plaintiff to place himself there by representations that only by so doing could the baler be made to do its work.

Defendant claimed it was incredible that plaintiff would interpret what its representative did in adjusting the machine as an illustration of the recommended manner of operation. In passing on this statement, the court said plaintiff's credulity was not so great as to warrant the conclusion, as a matter of law, that he was wholly unjustified in taking the conduct of defendant's representative as a recommendation as to the proper manner of operating the hay baler. The court also stated that conduct which might otherwise bar recovery as a matter of law was to be looked at in a different light when, as in the instant case, the seller's expert had indicated a proper way to operate the machine to plaintiff who was injured because of the directions given.

In an action filed against a farm implement dealer for injuries when a lever attached to the baler suddenly became unlocked from a groove in its anchor plate while plaintiff was operating it, striking plaintiff in the face, the Utah Court in *Winchester v. Egan Farm Service, Inc.*[15] held that there was no liability. The baler was delivered to defendant from the distributor fully assembled except for the lever and its attaching parts, which were assembled by defendant before delivery to plaintiff. The plaintiff said defendant assembled the lever by using a 3/8-inch anchor bolt inside a 1/2-inch hole in the sleeve. This allowed so much up and down play in the lever attachment that the locking pin could work loose and allow the lever to fly up. It was decided that plaintiff could not recover on this theory of negligence. The use of an anchor bolt larger than the 3/8-inch bolt recommended might have been better, but since defendant received the baler fully assembled, defendant had no responsibility or duty to plaintiff to redesign the machinery. The designing of the machinery, the court said, was an engineering job undertaken by the manufacturer, and defendant was not negligent if he assembled the lever in accordance with such design and the manufacturer's instructions.

In *Yaun v. Allis-Chalmers Mfg. Co.*[16] it was held the evidence showed a hay baler, when used as intended, was not a thing of danger. The injuries claimed by plaintiff resulted from a mistake in the method of using the machine. Evidence as to protective devices employed by other manufacturers of other machines which would gather grain was

[15] 4 Utah 2d 129, 288 P.2d 790 (1955).

[16] 253 Wisc. 558, 34 N.W.2d 853 (1948).

held not to support a finding that similar protection could have been devised for this machine. The other machines were not hay balers, and thus could not be set up as a standard by which to test the duties of the manufacturer of a hay baler to furnish a reasonably safe hay baler.

A supervisor of inspectors for the state industrial commission said that the machine, to be safe, required a quick-stopping device placed alongside the incline leading to the rollers. It was extremely doubtful, the court said, that such a device could have been utilized by plaintiff since his fingers were caught in the roller as he fell and the rollers traveled at the rate of six feet per second.

It was held in *Despatch Oven Co. v. Rauenhorst*[17] that where the seller of a corn dryer anticipated the dryer would only be used at a temperature of 180° to 200° Fahrenheit, which would involve no danger of fire, but the temperature was increased to twice the anticipated amount by the purchaser, such acts constituted "extraordinary negligence" and showed an utter disregard of safety. It was held the seller could not reasonably be held to have anticipated such acts, and was not responsible for the burning of a crib house.

It was further decided that the contract of sale set forth that the seller "assumes no liability" for consequential damages of any kind resulting from the use or misuse of the equipment. The court said the language "assumes no liability" was held properly construable as meaning that the seller "shall not be liable" and the term "consequential damages," as used in the disclaimer, clearly extended to the loss resulting from the germination of the seed corn due to insufficient drying.

In *Strickler v. Sloan*[18] a manufacturer was not found to be liable for failing to install a guard over open trash rollers of a corn picker. The absence of a guard was not a latent and concealed danger. The court held a manufacturer is not under the duty of making an accident-proof or foolproof machine. Further, a manufacturer is not under a duty to guard against injury from a patent peril or a source openly dangerous.

In *Johnson v. West Fargo Mfg. Co.*[19] an employee of the purchaser of a grain elevator manufactured by defendant was struck and killed when the elevator collapsed. The employees of the purchaser, together with the employee killed, assembled the elevator. They determined the cable used to raise and lower the elevator was not properly installed. They then lowered the lift arms used to support the auger tube of the elevator until the lift arms reached stop hooks located near the dis-

17 229 Minn. 436, 40 N.W.2d 73 (1949).

18 127 Ind. App. 370, 141 N.E.2d 863 (1957).

19 255 Minn. 19, 95 N.W.2d 497 (1959).

charge end of the auger tube, thereby allowing the cable to slack off so the cable could be restrung. When the cable slacked off, the stop hooks were the sole support of the auger tube. The stop hooks would only support about fifty pounds and the tube, which weighed 950 pounds, fell on decedent and crushed him. The instructions furnished by defendant for assembly of the elevator did not caution against only using the stop hooks to support the auger tube. Conversely, such use of the stop hooks was not recommended or urged in the instructions. It was held that whether, in restringing the cable, decedent should have found some other means of supporting the auger tube, and was negligent in assuming that the stop hooks would support the weight of the tube was a question of fact to be decided by the jury.

Another question of fact for the jury to decide was whether defendant should have anticipated the dangers arising out of the process of restringing the cable, and was negligent in not instructing the purchaser specifically how to restring the cable. When a manufacturer sends printed instructions instructing as to the proper use to be made of the product, the manufacturer is also responsible for giving accurate and adequate instructions with respect to the dangers likely to result in its improper use, the court said.

In the case of *Lovejoy v. Minneapolis Moline Power Implement Co.*,[20] the court discussed the introduction of evidence to the effect that the manufacturer could have used material which would have made the end product more safe. The court held that the manufacturer might be liable not only for negligence in the design and construction of the product, but also for the failure to give warning of dangers inherent in the use of a product that had apparently been carefully made. The court said:

> Such a manufacturer also may be liable if he knows or should know that the chattel is apt to cause bodily harm if not used in a specific manner if he fails to furnish adequate warning as to the dangers inherent in its use. If the manufacturer indicates by printed instruction to advise of the proper use to be made of a chattel, he assumes the responsibility of giving accurate and adequate instructions with respect to the dangers inherent in its use in some other manner.[21]

A most novel defense was advanced in the case of *Chapman v. Brown*[22] where plaintiff borrowed a hula skirt to attend a masquerade

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[20] 248 Minn. 319, 79 N.W.2d 688 (1956).

[21] *Id.* at 325, 79 N.W.2d at 693. Other cases upholding this view are: Hartmon v. National Heater Co., 240 Minn. 264, 60 N.W.2d 804 (1953); Schlottman v. Pressey, 195 F.2d 343 (10th Cir. 1952); Wright v. Carter Products, 244 F.2d 53 (2d Cir. 1957); Tingey v. E. F. Houghton & Co., 30 Cal. 2d 97, 179 P.2d 807 (1947). See Dillard and Hart, "Products Liability: Directions for Use and the Duty to Warn," 41 Va. L. Rev. 145 (1955).

[22] 198 F. Supp. 78 (D. Hawaii 1961), *aff'd* 304 F.2d 149 (9th Cir. 1962).

party. She was seated when the skirt caught fire, probably from a lighted cigarette deposited on the floor where she was seated. Defendant claimed the use of the skirt by plaintiff was not contemplated at the time the skirt was purchased. The purchaser of the skirt was shorter than the user of the skirt. Also, defendant said it did not contemplate the user of the skirt would seat herself on the floor at a party attended by a number of people who were drinking and smoking. The court held a jury question as to negligence on the part of the seller of the skirt was presented. The court held that the jury was entitled to find the seller must have been aware the skirt might be loaned out to friends attending social functions where there would be drinking and smoking. The jury could also find that the difference in size between purchaser and user of the skirt did not constitute a use or purpose different from that contemplated between the seller and purchaser since the skirt would have been on the floor if the purchaser would have seated herself.

An interesting Pennsylvania case decided in 1958,[23] held a plaintiff could amend a complaint designating the manufacturer of a farm tractor as defendant to permit plaintiff to proceed against the named defendant as a distributor of the product. The court said:

> I believe that a farm tractor is a chattel which is inherently dangerous since it is a machine which carries with it harmful potentialities when negligently or defectively constructed. It must be exposed, demonstrated and inspected in order for the manufacturer to satisfy the distributor that it is a saleable product and for the distributor to satisfy the retailer as to why said chattel is an acceptable marketable product.[24]

Evidence that other users of the same product suffered no injury may be introduced to aid in proving the product involved was not actually harmful. In this connection, defendant must prove identical circumstances and length of time the product was in use. It must be proved the user of the product was an average, ordinary individual.[25]

It is well known and recognized that products will deteriorate and fail from prolonged use without the manufacturer of the product being negligent. It is axiomatic that no manufacturer is duty-bound to produce a product which will not wear out as a result of normal wear and tear. Most courts, however, hold that even though it can be proved that a product has been safely used for a prolonged period of time, the

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23 Fleming v. John Deere Plow Co. of Syracuse, 158 F. Supp. 399 (W.D. Pa. 1958).

24 *Id.* at 400.

25 Parker v. Gulf Refining Co., 80 F.2d 795 (6th Cir. 1936), wax used for sealing jars; Simmons v. Gibbs Mfg. Co., 170 F. Supp. 818 (N.D. Ohio 1959), *aff'd*, 275 F.2d 291 (6th Cir. 1960), design of a toy.

manufacturer may be held liable under the facts of the specific cases. It has been held that defectiveness is a fact question to be resolved by a jury.[26]

The court in the New York case of *Gomez v. E. W. Bliss Co.*[27] dismissed an action brought because of a failure of a power press. The failure occurred after the machine had been in operation for almost nine years. The evidence indicated that little attention had been paid to maintaining and servicing the machine, contrary to the manufacturer's instructions furnished with the machine.

The court commented that the manufacturer had no duty to furnish a machine that would not wear out. Furthermore, the court said that common sense dictates that machines be inspected periodically and worn parts replaced; a duty which rested on plaintiff's employer, not on the manufacturer. The court distinguished this case from those involving the malfunction of a newly acquired machine.[28]

Three Ohio cases are interesting and pertinent:

1. *Witham v. Kroger Grocery & Baking Co.*,[29] wherein the Court held, as follows:

> In an action for damages for injuries caused by eating biscuit made from flour sold to a consumer by a retail grocer, which flour allegedly contained deleterious matter, including glass, where both the presence of the foreign matter in the flour, and the cause of injuries, if any, are in dispute, a finding by the jury in favor of the grocer, in the absence of interrogatories, will not be disturbed on the weight of the evidence. . . .
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> The defendant's evidence tended to show that the foreign materials could not have been in the flour when purchased, as the sack is automatically filled at the mills from bins through a chute to which the bag is attached and then sealed; that the shipment is in car lots and distributed to the chain of retail groceries of the defendant company; and that at the time of the purchase the bag was still tied with the miller's knot. Some evidence was put in challenging the veracity of some of the plaintiff's witnesses. From this it is plain that in the absence of direct proof the inferences must be drawn by the jury. It was also the province of the jury to pass upon the credibility of the witnesses, all bearing upon the question of whether the glass and other substances were in the flour when sold.

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26 Hartlich v. General Motors Corp., 10 F.R.D. 380 (N.D. Ohio 1950), truck which had been used for two weeks before flywheel broke; International Derrick v. Croix, 241 F.2d 216 (5th Cir. 1957), derrick which had been used for seven years; McNamara v. American Motors Corp., 247 F.2d 445 (5th Cir. 1957), defective steering column jacket.

27 27 Misc. 2d 649, 211 N.Y.S.2d 246 (Sup. Ct. 1961).

28 *Id.* at 651, 211 N.Y.S.2d at 648. See Beckhusen v. E. P. Lawson Co., 9 N.Y.2d 726, 174 N.E.2d 327, 214 N.Y.S.2d 342 (1961).

29 51 Ohio App. 499, 1 N.E.2d 949 (1935).

2. *Mente v. Albers Super Markets, Inc.*,[30] wherein the Court held, as follows:

> The burden of proof rested upon the plaintiff to prove that the wiener actually contained a foreign substance, so that evidence by the manufacturer detailing the method of processing and manufacture of the particular wiener involved seems logically to be material, relevant and probative on the likelihood of any foreign substance getting into the product during such processing and manufacture.
>
> The sole testimony that the wiener contained a foreign substance coming from the plaintiff and her mother-in-law, it became the peculiar province and duty of the jury to judge of the credibility of those witnesses in determining the ultimate fact to be proved.
>
> The proffered evidence reflecting on defendant's claim that it was impossible for a foreign substance to get into the product during processing and manufacture seems likewise material, relevant and of probative force in aiding the jury in its duty of determining the credibility of the witnesses.

3. *The Dow Drug Co. v. Nieman, et al.*,[31] wherein the Court held, as follows:

> It is undisputed that Nieman purchased four cigars at the store of The Dow Drug Company, took them home with him, and on the same day proceeded to smoke one of them, when it exploded, causing substantial physical injury. These cigars were taken from a box of cigars that had been purchased by The Dow Drug Company from The S. Frieder & Sons Company. The evidence shows that the explosion was caused by a fire cracker that was inside the cigar. . . .
>
> The case was submitted to the jury on the theory that if the plaintiff had proven that he had purchased the cigar from The Dow Drug Company, that it was not of merchantable quality, and that he was injured by reason thereof, he was entitled to recover against the company. This was the correct theory and there was abundant evidence to sustain the verdict for the plaintiff.
>
> The judgment in the plaintiff's favor against The Dow Drug Company will, therefore be affirmed.
>
> The trial court made the liability of The S. Frieder & Sons Company turn on whether the cigar sold by it to The Dow Drug Company was reasonably fit for the purpose for which it was purchased, or whether The S. Frieder & Sons Company was negligent in failing to properly inspect the cigar that it sold to The Dow Drug Company, knowing it was to be resold to the company's customers. While there is evidence that The Helena Cigar Company manufactured this cigar, the evidence disclosed that The S. Frieder & Sons Company marketed it as its own product, and therefore was properly held to such responsibility as might attach to it as the original manufacturer.

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30 92 Ohio App. 152, 109 N.E.2d 527 (1951).

31 57 Ohio App. 190, 13 N.E.2d 130 (1936).

> Whatever negligence there was in the original manufacture must be attributed to it.
>
> That there is a liability upon a negligent manufacturer who sells articles knowing they are intended for resale to sub-purchasers is clear from the trend of modern authorities. The only controversy is as to the basis of the liability, some holding that the implied warranties are made for the benefit of the sub-purchasers and form the basis of liability, and others holding that there must be proof of negligence to impose a liability.... (Citations omitted.)
>
> In the case at bar there can be no doubt that there was evidence of negligence in the manufacture of this cigar. In fact the evidence indicates that it was the intention to make it defective as a cigar by the insertion of a firecracker in it. Under such circumstances the case was properly submitted to the jury, and as the charge authorized a verdict in favor of the plaintiff on both the theory of implied warranty and negligence, there was no error prejudicial to the plaintiff in the instruction.

A manufacturer must exercise ordinary care in performing reasonable tests and making regular inspections to determine whether his product is dangerous. In the case of *Northern v. General Motors Corp.*[32] the court held that defendant was in no position to argue that a fracture in a steering mechanism was not reasonably discoverable since the technique of X-raying steel and other methods of testing steel had been recognized, and were available to the defendant.

In a forward-looking dissenting opinion, Mr. Justice Jackson, in the case of *Dalehite v. United States*[33] wrote:

> This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Producers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.

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[32] 2 Utah 2d 9, 268 P.2d 981 (1954).

[33] 346 U.S. 15 (1953).

In the case of *DiVello v. Gardner Machine Company*,[34] the court held as follows:

> The principle that the manufacturer or seller of goods is liable for injuries to persons due to defects therein, is not limited to things which, in their normal operation, are implements of destruction, but if the nature of the thing is such that it is reasonably certain to place persons in peril when negligently made, the liability attaches, irrespective of contract, for failure properly to inspect and discover defects, coupled with knowledge of probable danger therefrom. . . .
>
> A grinding wheel designed to be revolved at high speed is a dangerous instrumentality if it contains a latent defect which causes it to disintegrate upon ordinary use and a workman injured in such may recover against the person who sold the wheel to his employer on the basis that it is negligent to sell such an instrumentality and that contemplation must be had for the usage to which it will be put and the liability of injury to those using it.

Courts have universally held evidence of prior accidents and prior failures of function may be considered by the jury even though the circumstances surrounding the prior accidents or malfunctioning are not shown.

In a case in Virginia involving a child's death resulting from drinking furniture polish,[35] the court admitted evidence of 32 cases of chemical pneumonia involving the consumption of the polish. Four of those 32 cases involved children who died from drinking the polish. The court held:

> In order to prove their case plaintiffs had to show a duty to warn which the defendants had violated. To do this it was necessary to show that defendants knew, or should have known, that the product was being used, or might be used, in a dangerous manner, that is, that it was, or might be, drunk by humans. To do this plaintiffs might have relied upon the application of the rule of reasonable care under the circumstances to the facts that an innocuous looking deadly poison was coming into the environment of the home and thus into close proximity to children. But the plaintiffs might also try to raise a duty to warn by the additional method of proving that the defendants had *actual knowledge* (emphasis by the court) that the product was subject to misuse, that is, human consumption. Out of a super-abundance of caution counsel for plaintiffs, not content to rest its case on the first ground, chose to buttress it by proof of actual knowledge of the danger by the defendants.
>
> These admissions do no more than show defendants' actual knowledge of thirty-two instances in which their product had been consumed by humans. The only similarity of those instances with the present case required is that the product was drunk by humans and that it caused chemical pneumonia. If the defendants *knew* (em-

[34] 102 N.E.2d 289 (C.P. 1951).

[35] Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962).

> phasis by the court) that their product was being drunk with harmful consequences, they had a duty to warn, whether it was being drunk by adults or children, regardless of the circumstances, for then there is but one answer to the question of foreseeability.
>
> The only problem involved in the question of the admissibility of this evidence is one of relevancy. It has long been established that such evidence is relevant to prove knowledge.[36]

Plaintiff, a child five years old, sued to recover damages for burns sustained when her pajamas were ignited while she was standing in front of an open gas heater in an apartment which her parents had rented from defendants. On an appeal by plaintiff from the sustaining of a demurrer to the amended complaint, without leave to amend, the judgment was affirmed by the Supreme Court of California in *Hanson v. Luft.*[37]

The settled rule, as stated by the court, is "that while a landlord is under a duty to warn the tenant of any hidden danger or defect in the leased premises of which he has knowledge, there is no duty to warn the tenants of obvious and patent dangers and defects. . . . If the defect is known to the tenant and the tenant fails to protect his invitee against it, the tenant may be liable but the landlord is not." The danger from the open gas heater was deemed "a patent one" which was covered by the settled rule.

The amended complaint alleged that "defendants had a similar previous experience with the same heretofore described appliance in the same location and premises, wherein another minor child was burned." Plaintiff contended defendants, by reason of this experience, had knowledge of the danger not possessed by her parents, and that while the danger to an adult was patent, it was a latent danger to her. The court stated "this attempted distinction flies in the face of common knowledge" and concluded:

> It has been held in a number of cases in other jurisdictions that where premises are let to the parents of children with conditions existing which present a patent and obvious danger of injury to such children the duty of protecting the children from such obvious dangers rests upon the parents who have elected to become tenants of such premises with knowledge of the condition of the danger to their children; and that the landlord cannot be held liable for injuries suffered by the children from such obvious and patent dangers. The parents of this five-year-old child must have been aware of the fact that the danger to the child from this open flame was greater, because of her immaturity, than it would be to an adult, and that they must for that reason exercise the proper and necessary care to protect her from its dangers.

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[36] *Id.* at 88.

[37] 58 Cal. 2d 443, 374 P.2d 641, 24 Cal. Rptr. 681 (1962).

Courts also have generally held that evidence of changes in design or in the product itself after the date of an accident is inadmissible to prove fault. In an action for injuries sustained while using an automatic washing machine, plaintiff claimed defendant was negligent in design and construction of the washing machine, in that it had failed to equip the machine with a safety braking device which would bring the tub or basket to a stop when the mechanism on the machine indicated that it was "off," or when lid was lifted. She also claimed that defendant was negligent in failing to adequately warn her of the fact that the tub or basket of the machine continued to spin rapidly after the machine showed "off," and after the lid was lifted.

Prior to commencement of trial, plaintiff proposed to offer in evidence in the trial the fact that, subsequent to her accident, defendant had made certain changes in its washing machines by installing a braking device, which brought the spinning tub or basket to a stop when the machine was shut off, and a locking device on the top cover, which prevented its being opened until the tub or basket had ceased rotating. The court ruled that this proposed evidence, relative to the changes defendant made in its washing machines subsequent to the accident, was not admissible on the ground that such evidence was not proof of its alleged negligence before and at the time the accident happened. Plaintiff contended that she should have been allowed to show these changes that defendant made in its machines subsequent to the accident, not as evidence of its negligence, but as evidence of the practicability or feasibility of incorporating such safety devices on its automatic washing machines. There are cases which support plaintiff's contention here.[38] However, Sixth Circuit, in holding evidence was properly excluded, merely cited *Northwest Airlines, Inc. v. Glenn L. Martin Co.*,[39] also holding such "hindsight" evidence to be inadmissible.[40] The court did not discuss plaintiff's claim of negligent failure to warn. But in the Minnesota case of *Rosin v. International Harvester Co.*[41] the court discussed a replacement part which was superior to a part on the original product as it came off the assembly line and said the jury could consider this evidence, and "could conclude that the manufacturer should have in the first place installed a grease seal of the design and quality of the replacement part."

In addition to evidence of the product being defective or danger-

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[38] See 1 Frumer & Friedman, Products Liability, § 12.04 (1960).

[39] 224 F.2d 120, 50 A.L.R.2d 882 (6th Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

[40] Cox v. General Electric Co., 302 F.2d 389 (6th Cir. 1962).

[41] 115 N.W.2d 50 (Minn. Supp. Ct. 1962). *Cf.* Steele v. Wiedemann Machine Co., 280 F.2d 380 (3d Cir. 1960).

ous, plaintiff must be able to prove by a preponderance of the evidence that the manufacturer or distributor had knowledge at the time they had possession or control of the product it was or would be defective, dangerous or harmful.[42]

The courts hold that evidence of a product being broken or defective after an injury has been sustained is not conclusive of the issue of proximate cause. It is for the jury to consider whether such evidence is proof of proximate cause, since the jury could find the broken or defective condition did not exist just prior to the injury having been sustained.[43]

Here it is believed important to distinguish between claims of negligence and liability for breach of warranty. Negligence arises when the manufacturer or purveyor of the product involved fails to exercise ordinary care so that as a proximate consequence of this "fault" injuries and damages result. Warranty is not grounded upon a failure to use ordinary care or wrongdoing. Liability for a breach of warranty comes about when the product fails to perform or does not come up to the manufacturers' or suppliers' claims for the product, whether these claims or representations be express or implied. Thus, fault is not the basis of a warranty case for the failure of a product. Proof by the manufacturer or supplier of the absence of negligence and exercise of ordinary care is of no importance in warranty cases. Generally such evidence is not admissible.[44]

An express warranty is a positive assertion made by a manufacturer or supplier of a product pertaining to the performance of the product. It is a positive affirmation of a fact or promise made concerning the capabilities of the product.[45]

In the *Rogers v. Toni Home Permanent Co.* case,[46] the court stated its holding was "opposed to the present weight of authority," but nevertheless held the petition stated a cause of action for breach of an express warranty because:

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42 Darling v. Caterpillar Tractor Co., 171 Cal. App. 2d 713, 341 P.2d 23 (1959); Wolden v. Deering, 105 Minn. 259, 117 N.W. 493 (1908); Hofstedt v. International Harvester Co., 256 Minn. 453, 98 N.W.2d 808 (1959); and Dunn v. Ralston Purina Co., 38 Tenn. App. 229, 272 S.W.2d 479 (1954).

43 Lovas v. General Motors Corp., 212 F.2d 805 (6th Cir. 1954); O'Donnell v. Geneva Metal Wheel, 183 F.2d 733 (6th Cir. 1950); and Heichel v. Lima-Hamilton, *supra* note 10.

44 Rasmus v. A. O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958); Brown v. Globe Laboratories, 165 Neb. 138, 84 N.W.2d 151 (1957); and Uniform Commercial Code § 2-314, comment 13 (1958).

45 Uniform Commercial Code, § 2-313 (1958).

46 167 Ohio St. 244, 147 N.E.2d 612 (1958).

> Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumer are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the labels on his products are inducements to the ultimate consumer, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representation and later suffers injury because the product proves to be defective or deleterious.[47]

An implied warranty holds the supplier of goods liable to purchasers because the supplier, by placing the goods on the market, by operation of law, represents that such goods are usable, or are reasonably fit for the particular purpose for which they are offered.

The case of *Chapman v. Brown* says this concerning implied warranties:

> This is a case in which, although the latter was not specifically mentioned during the trial, there was both an implied warranty as to quality and fitness for use, and an implied warranty of merchantability, which were identical as to fitness of the skirt for use *as an article of clothing*. (Emphasis added.) It is the court's firm belief that any article of clothing, such as a hula skirt, which is so highly flammable as to be dangerous to life and limb, is defective and unsuitable for the use for which it was sold, and selling the same would be a breach of both implied warranties of quality and fitness, and merchantability.[48]

In the Missouri case of *Worley v. Procter & Gamble Mfg. Co.*,[50] plaintiff had purchased a detergent from local retail merchants for

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47 *Id.* at 248-249, 147 N.E.2d at 615-616.

48 198 F. Supp. 78, 94 (D. Hawaii 1961).

49 *Supra* note 22, at 94.

50 241 Mo. App. 114, 253 S.W.2d 532 (1952).

use in a restaurant. The petition alleged a breach of warranty, stating that the preparation was warranted to be fit and safe for use in washing dishes. The package had printed on it the statement, "And, of course, Tide is kind to hands, too." The court, although reversing a judgment allowing recovery, held that recovery was not barred by lack of privity of contract between plaintiff and defendant. Representations made by a manufacturer of products such as "Tide" were said to be inducements to buyers making a purchase of the product, and were to be regarded as warranties imposed by law, independent of the manufacturer's contractual intentions. The liability thus imposed upon the manufacturer, the court said, springs from representations direct to the ultimate consumer, and not from the breach of any contractual undertaking on the part of the manufacturer. Defendant's contention that the evidence failed to show that plaintiff relied upon the alleged warranty was rejected, the court saying that it was not necessary for plaintiff to show by direct evidence that she relied on the warranty, it being sufficient if from the circumstances shown, reliance thereon fairly appeared.

It was pointed out that the warranty was printed on the box of "Tide," and related to a subject likely to attract customers and induce a purchase, and plaintiff made no investigation of the ingredients of the product, nor did she rely upon information furnished by others. The court pointed out that the general rule is that no proof of the buyer's reliance on the warranty is necessary other than that the seller's statements are the kind which naturally would induce a purchase.

The case of *Pabellon v. Grace Line, Inc.*[51] involved an explosion which resulted when a sailor had mixed a quantity of caustic soda or lye, sold under the name of "Dearborn Cleaner No. 7" and used for cleaning drains, "Pride" washing powder, oxalic acid, and a cleanser sold under the brand name of "Oakite." A third party complaint was filed against the suppliers of these cleansers and detergents and the manufacturers. The court said that "there would appear to be at least a possibility of liability against the suppliers for breach of warranty and against all the defendants for negligence." With respect to the contention that there could be no claim upon breach of warranty insofar as products sold under their trade names were involved—the applicable New York statute specifying that in the case of a sale of a special article under its patent or other trade name there is no implied warranty as to its fitness for any particular purpose—the court held that this argument overlooked the settled construction of the statute to the effect, first, that the fact that an article happens to have a trade

[51] 191 F.2d 169 (2d Cir. 1951), *cert. denied*, 342 U.S. 893 (1951).

name does not, per se, bring the sale within the provision of the statute, and second, that even if it does, the statute does not necessarily exclude a warranty of merchantability. A purchase under a trade name does not mean the purchaser is not relying on the skill and judgment of the seller or on the belief that the article will perform a particular function.

The *Ringstad v. I. Magnin & Co.* case[52] dealt with the purchase of a summer cocktail robe which caught fire when it came into contact with a burner of an electric stove. The court held a retail sale of wearing apparel was within the comprehension of a statutory provision to the effect that where a buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and relies on the seller's skill or judgment, there is an implied warranty that the goods are reasonably fit for such purpose. It was clear an article of wearing apparel is to be worn and that such purpose must have been known to defendant seller. Plaintiff relied on defendant's skill and judgment in determining whether the garment was reasonably fit for the required purpose, since she said that although she examined the robe for color, texture, size, style, and design, she was totally and wholly uninformed as to the resistance of the fabric to flame or fire. She claimed she relied wholly and exclusively on defendant to market merchandise which was fit for the purposes for which it was intended, and which was safe for public use.

The court held, further, that plaintiff was not barred from recovery as a matter of law on the ground that her injury had been sustained by reason of an improper use of the article. Defendant said that the garment was a long, loose, flowing, more or less elegant, garment, intended primarily to be used in the home during leisure hours "under conditions where people would be expected to sit down and enjoy a drink rather than be working in a kitchen." The court said that although it would not rule that the use made of the cocktail gown in the instant case was proper, the propriety of the use made of the garment was, on the facts presented, a question for the trier of facts.

Under the common law, the manufacturer of chattels was not liable for breach of an implied warranty unless there was privity of contract. This general rule is followed in a majority of states, but like the hearsay rule, it has been riddled with exceptions. The most noted exceptions are found in cases involving foodstuffs where almost all the courts hold the manufacturer liable for breach of warranty that goods are fit for human consumption. Another exception pertains to those articles which are inherently dangerous. A third exception, followed

[52] 39 Wash. 2d 923, 239 P.2d 848 (1952). *Accord*, Ingalls v. Meissner, 11 Wisc. 2d 371, 105 N.W.2d 748 (1960).

in many states, is found where the purchaser relied upon representations made by the manufacturer in advertising materials or on labels. These representations are the crux of the warranty regardless of the contractual obligations of the vendor.

The trend in many areas is away from the general rule, and this is pointed up in the most recent decisions.

The interesting case of *Rogers v. Toni Home Permanent Co.* declares:

> A prevalent but mistaken notion is extant that the term, warranty, has always carried the implication of a contractual relationship. From a historical standpoint such notion is without foundation. Some of the cases, and well known and respected writers on legal subjects, point out that originally the consumer or user of an article, which was represented to be in good condition and fit for use and proved not to be, was accorded redress by an expansion of the action of trespass on the case to include deceit—a fraudulent misrepresentation—which sounds distinctly in tort. Undoubtedly, the recognition of such a right of action rested on the public policy of protecting an innocent buyer from harm rather than to insure any contractual rights. . . .
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> Other writers have no hesitancy in asserting that in the beginning an action on "breach of warranty" was a tort action to give relief for the breach of a duty assumed by the seller, and that the introduction at a much later date of the method of declaring on a warranty *indebitatus assumpsit* (an implied promise or obligation on the part of one to pay to another what in fairness and good conscience the former should pay) constituted the recognition of an additional or alternative remedy of a contractual aspect to secure relief where a breach of warranty is involved.[53]

The now famous land mark case of *Henningsen v. Bloomfield Motors, Inc.*, held as follows:

> [U]nder early common law concepts of contractual liability only those persons who were parties to the bargain could sue for a breach of it. In more recent times a noticeable disposition has appeared in a number of jurisdictions to break through the narrow barrier of privity when dealing with sales of goods in order to give realistic recognition to a universally accepted fact. The fact is that the dealer and the ordinary buyer do not, and are not expected to, buy goods, whether they be foodstuffs or automobiles, exclusively for their own consumption or use. Makers and manufacturers know this and advertise and market their products on that assumption; witness, the "family" car, the baby foods, etc. The limitations of privity in contracts for the sale of goods developed their place in the law when marketing conditions were simple, when maker and buyer frequently met face to face on an equal bargaining plane and when many of the products were relatively uncomplicated and conducive to inspection by a buyer

[53] *Supra* note 46, at 247, 147 N.E.2d at 614-615.

> competent to evaluate their quality. . . . With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy it became obvious that the consumer was the person being cultivated. Manifestly, the connotation of "consumer" was broader than that of "buyer." He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product. Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, the society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur. . . .
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> [I]t is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain.[54]
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> By proceeding in warranty, as indicated above, the plaintiff does not have to prove negligence, and also is entitled to take advantage of reasonable inferences which the jury may find from circumstantial evidence.

In a case involving a defendant who manufactured chemical resins, marketed under the registered trademark "Cyana," used by textile manufacturers to process their fabrics so as to prevent shrinkage, plaintiff, a manufacturer of children's knitted sportswear, bought large quantities of fabrics thus treated from middlemen fabric manufacturers, licensed by defendant to treat their fabrics with "Cyana," and to sell under defendant's label.[55] In purchasing such Cyana-treated fabrics, plaintiff relied upon representations made by defendant in its sales literature and other advertising, and also the labels or garment tags furnished by defendant. These labels read, "A CYANA Finish—This Fabric Treated for Shrinkage Control—Will Not Shrink or Stretch Out of Fit—Cyanamid." After most of the fabrics purchased by plaintiff had been made up into garments and sold, it was discovered that ordinary washing caused them to shrink and lose their shape.

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[54] 32 N.J. 358, 379-384, 414, 161 A.2d 69, 81-84, 100 (1960). *Accord*, B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959); Hansen v. Firestone Tire and Rubber Co., 276 F.2d 254 (6th Cir. 1960).

[55] Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (1962).

The court disregarded the lack of privity, and affirmed denial of a motion for summary judgment by defendant. The court mentioned the changes in relationships in the marketing field, and the reliance placed on direct-to-consumer advertising by manufacturers as reasons for this holding.

While some state courts (Kansas, New York and Oregon) apply the statutory limitations referable to contract actions, most courts apply the statutory period used in personal injury cases to cases brought for alleged breaches of warranties.[56]

While contributory negligence and assumption of risk are recognized as legitimate defenses in negligence cases involving products, many courts will reject these defenses when they are advanced in products cases brought on complaints of breaches of express or implied warranties except when it can be proved the plaintiff used the product improperly.[57]

In *Frier v. Procter & Gamble Distributing Co.*[58] the court held that there was no error in rendering judgment on the record for defendant. There was no evidence that plaintiff ever complained to her employer that the product ("Tide") was causing her hands to be injured. She never asked for something else to be used in its place. She continued to use the product for more than three months. All during this period she obtained salve or ointment from a drugstore, and received treatment from a doctor. Other witnesses who testified with respect to the irritating qualities of the product had stopped using it when they found it was affecting their hands, and their trouble had ceased.

Sheptur v. Procter & Gamble Distributing Co.[59] was an action for injuries allegedly sustained as a consequence of the use of defendant's detergent, "Tide." Plaintiff claimed dermatitis developed from the use of the product. An expert witness stated that the eruption on plaintiff's hands could have been caused by "Tide." There was evidence, however, that plaintiff used other soaps and detergents at her home and at the place of her employment. The court affirmed a judgment in defendant's favor, holding that proximate causation was not shown. The question of the cause of the dermatitis was said to involve scientific and medical

[56] Seymour v. Union News Co., 349 Ill. App. 197, 110 N.E.2d 475 (1953); Finck v. Albers Super Markets, 136 F.2d 191 (6th Cir. 1943); and Baatz v. Smith, 361 Mich. 68, 104 N.W.2d 787 (1960). See Annot. 37 A.L.R.2d 703 (1954).

[57] Lake v. Emigh, 118 Mont. 325, 167 P.2d 575 (1946); De Graf v. Anglo California Nat. Bank, 14 Cal. 2d 87, 92 P.2d 899 (1939); Northwest Airlines v. Glenn L. Martin Co., 224 F.2d 120, 229 F.2d 434, 50 A.L.R.2d 882 (6th Cir. 1955). See 38 Am. Jur., *Negligence* § 188 (1941); 65 C.J.S., *Negligence* § 119 (1950); Dillard and Hart, *op. cit. supra* note 21.

[58] 173 Kan. 733, 252 P.2d 850 (1953).

[59] 261 F.2d 221 (6th Cir. 1958), *cert. denied*, 359 U.S. 1003 (1959).

facts beyond plaintiff's knowledge or experience, and the testimony of plaintiff's expert witness failed to develop a prima facie case. The court did not say that "Tide" was a more probable cause of the dermatitis than the other soaps or detergents used by plaintiff.

In *Shaw v. Calgon, Inc.*,[60] plaintiff claimed injuries sustained as a consequence of her hands coming into contact with defendant's detergent "Calgonite," intended for use in automatic dishwashers. Plaintiff went to the kitchen sink and reached for a product known as "Calgon," but mistakenly picked up a box of "Calgonite." She poured some of the "Calgonite" into a pail of hot water, and began to wash venetian blinds. She immediately felt a burning sensation. She looked at the box, and found she had used the wrong product. She examined the box for information regarding an antidote printed on the "Calgonite" package, but could not find such information. She did read that the product was highly alkaline. There was evidence that the box contained a statement that it was not to be used for tasks "involving contact of the hands with the wash water," and although the "Calgonite" could be used for certain cleaning tasks apart from dishwashing, the user should avoid "contact of the hands with Calgonite solutions." The court held in defendant's favor and rejected plaintiff's contention that defendant could be charged with liability for failing to state on the "Calgonite" box the nature of the contents of the product, and an antidote therefor. It was said that defendant could not reasonably have been required to do more than give specific instructions for the use of its product and a warning against allowing it to come in contact with the hands. There was said to be no authority for the proposition advanced by plaintiff that a manufacturer of detergents is required, in addition to giving proper directions as to use and a warning of possible injury, to state on the container both the chemical nature of the contents and the antidote or neutralizing agent to be used in case of injury. Plaintiff's failure to exercise due care, under the circumstances, also barred her recovery. She blindly reached out for a box of "Calgon," and did not look to see what box she actually had in her hand. She proceeded to pour an unspecified amount into the pail of hot water and to permit the solution to come in contact with her forearms, all of which proved her negligence.

Most of the product cases turn on proof of negligence or on breaches of warranties on the part of the suppliers of the product. Not many cases (in proportion to the number filed) involve the doctrine of *res ipsa loquitur*. Presently, it appears the courts are not extending the doctrine. The requirements of control and possession are strictly

[60] 35 N.J. Super. 319, 114 A.2d 278 (1955).

adhered to, except in a few isolated cases where the facts are unusual.

The court in *Ford Motor Co. v. Wolber*[61] held that defendant could not be found liable for failure to give notice of the tendency of a tractor to turn over, where there was no evidence that there was such faulty design and construction of the tractor as to give rise to such a tendency. After purchasing the tractor, the injured plaintiff's employer had installed a governor thereon and two additional rear wheels. The court held the *res ipsa loquitur* doctrine did not apply because the tractor was not the same as the one sold by defendant, and because it was proved the tractor was in regular use for over two years without having overturned. These facts indicated to the court that something which was done to the machine after it had passed from the manufacturer's custody and control was responsible for the accident.

In the *Lovejoy v. Minneapolis-Moline Power Implement Co.*[62] the court held that plaintiff was not entitled to invoke the rule of *res ipsa loquitur*. The court said the doctrine would be used only where the apparent cause of an accident is such that defendant would be solely responsible for any negligence connected with it. In this case, the accident was unexplained and could reasonably be attributed to one or more causes for which defendant would not be responsible.

In *Cunningham v. Coca-Cola Bottling Co.*,[63] involving an explosion of a beverage vending machine, plaintiff's experts testified that hydrogen was liberated in the tank and ignited by electricity. Defendant's experts testified that they found sodium hydroxide splattered on a nearby window, and if the explosion were caused by the ignition of hydrogen, there would be no residue of sodium hydroxide. Defendant claimed that the explosion was caused by someone placing sodium in the lid of the machine so that it fell into the water when the lid was opened. Inasmuch as the explosion was held to be equally attributable to a cause for which defendant would not be responsible, *res ipsa loquitur* was inapplicable.[64]

In conclusion, it must be stated that what has been set forth above is only a minute sampling of the myriad of cases involving the use of

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[61] 32 F.2d 18 (7th Cir. 1929), *cert. denied*, 280 U.S. 565 (1929).

[62] *Supra* note 20.

[63] 87 Cal. App. 2d 106, 198 P.2d 333 (1948).

[64] Other cases dealing with *res ipsa loquitur* are: Miller v. Steinfeld, 174 App. Div. 337, 160 N.Y.S. 800 (1916); Haas v. Carrier Corp., 329 S.W.2d 727 (Tex. Civ. App. 1960); Reynolds v. Natural Gas Equipment, 184 Cal. App. 2d 724, 7 Cal. Rptr. 879 (1960); Hammerschmidt v. Ford Motor Co., 192 Cal. App. 2d 3, 13 Cal. Rptr. 274 (1961); Mabe v. Huntington Coca-Cola Bottling Co., 145 W. Va. 712, 116 S.E.2d 874 (1960); Schafer v. Wills, 171 Ohio St. 506, 172 N.E.2d 708 (1961); and Lyons v. Jahncke Service, Inc., 125 So. 2d 619 (La. App. 1960).

products. The complexities of our expanding intelligence in the fields of engineering, chemistry and other related sciences, leads us to the inevitable conclusion that products litigation will require every active negligence lawyer to acquire as much knowledge as possible within these special scientific fields in order that clients will be served adequately and properly.

Concepts of liability and responsibility are changing almost daily. New ideas and theories are ever clamoring for attention, requiring the trial lawyers to be ever alert and properly prepared to argue for or against such novel theories and ideas as may be developed, to the end that justice is done in this field of the law.